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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1978

No. 79-393

UNITED STATES OF AMERICA,
Petitioner,

vs.

MICHAEL J. CONWAY,
Respondent.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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SUBJECT INDEX

	Page
Questions presented	1
Statement of facts	2
Reasons for denying the petition	3
Conclusion	11

TABLE OF AUTHORITIES CITED

Cases

Bell v. Bruen, 42 U.S. 169 (1843)	8
Berenyi v. Immigration Director, 385 U.S. 630 (1967)	6
Carruthers v. Reed, 102 F.2d 933 (8th Cir. 1939)	6
Duignan v. United States, 274 U.S. 195 (1926)	9
Graver Mfg. Co. v. Linde Co., 336 U.S. 271 (1949)	6
Hanks v. United States, 388 F.2d 171 (10th Cir. 1968)	7
Helvering v. Hormel, 111 F.2d 1 (8th Cir. 1940) cert. granted 311 U.S. 626, affirmed 312 U.S. 552 (1940)	9
Johnson v. United States, 318 U.S. 189 (1942), rehearing denied 318 U.S. 801	6
Langes v. Green, 282 U.S. 531 (1931)	5
Lawn v. United States, 355 U.S. 339 (1957)	6
Rakas v. Illinois, ... U.S. ...., 58 L.Ed.2d 387 (1978)	11
Tucker v. United States, 375 F.2d 363 (8th Cir. 1967), cert. den. 389 U.S. 888	7
United States v. Atkinson, 297 U.S. 157 (1935)	9
United States v. Benson, 495 F.2d 475 (5th Cir. 1974)	7
United States v. Crowell, 586 F.2d 1020 (4th Cir. 1978)	10
United States v. Friedman, 506 F.2d 511 (8th Cir. 1974), cert. den. 421 U.S. 1004, rehearing denied 423 U.S. 885	6
United States v. Galante, 547 F.2d 733 (2d Cir. 1976)	10
United States v. Hart, 546 F.2d 798 (9th Cir. 1976 en banc), cert. den. 97 S.Ct. 1155 (1977)	4

TABLE OF AUTHORITIES CITED

CASES

	Page
United States v. Hood, 493 F.2d 677 (9th Cir. 1974)	4
United States v. House, 524 F.2d 1035 (9th Cir. 1975)	10
United States v. Jackson, 585 F.2d 653 (4th Cir. 1978)	10
United States v. Johnston, 268 U.S. 220 (1924)	6
United States v. Kahn, 366 F.2d 259 (2d Cir. 1966)	7
United States v. Lovasco, 431 U.S. 783 (1977)	8
United States v. Manton, 107 F.2d 834 (2d Cir. 1938)	6
United States v. McCambridge, 551 F.2d 865 (1st Cir. 1971)	11
United States v. Page, 302 F.2d 81 (9th Cir. 1976 en banc)	4
United States v. Pentado, 463 F.2d 355 (5th Cir. 1972), cert. den. 409 U.S. 1079	7
United States v. Prueitt, 540 F.2d 995 (9th Cir. 1976)	7
United States v. Smith, 550 F.2d 277 (5th Cir. 1977)	10
United States v. Wilson, 536 F.2d 883 (9th Cir. 1976)	9
Virtue v. Creamery Package Mfg. Co., 227 U.S. 8 (1912)	8
Walling v. General Industries Co., 330 U.S. 545 (1947)	5
Weade v. Dichmann, Inc., 337 U.S. 801 (1949)	8

Constitution

United States Constitution, Fourth Amendment 4, 10, 11

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Respondent, Michael J. Conway, opposes the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

QUESTIONS PRESENTED

(1) Was the District Court's conclusion that Respondent had a reasonable expectation of privacy clearly erroneous when measured against all the facts before that court?

(2) Did the Government invite the error complained of so that it is barred from raising the issue in this Court?

(3) Does the Government's failure to present to the District Court the questions of law urged in this Court foreclose consideration of those questions?

(4) Was the seizure of the cocaine and the search of the package containing it illegal?

STATEMENT OF FACTS

The following Statement of Facts supplements that found in the Petition for Writ of Certiorari (hereinafter "Petition") and the opinion of the Court of Appeals (Petition 2a-9a).

Respondent Michael Conway and co-defendant Mazzelli shared a room at the Howard Johnson's Motel during their stay in Miami, Florida (C.T. 58, R.T. II:22[1]). On March 1, 1978, they went to the Miami International Airport. They appeared to Miami Police to know and be associated with each other (C.T. 52-54). Both Mr. Conway and Mr. Mazzelli boarded the same flight bound for San Francisco. Upon arrival, both went to the baggage claim area where they spoke with each other and exchanged a note (R.T. II:17). At the baggage claim area, Mr. Mazzelli picked up a suitcase which had been recently purchased by and belonged to Mr. Conway (Petition: 4a; C.T. 52).

Both individuals were arrested upon leaving the baggage claim area since it was suspected that they were smuggling drugs together from Miami (R.T. I:18-19; Petition: 2a-3a). Mr. Conway was taken upstairs (R.T. II: 48-51) to a room in the terminal building. Mr. Mazzelli was taken to a separate room. Mazzelli was placed in a locked holding cell and the suitcase carried by him was retained outside the

[1]As used herein, "C.T." refers to the Clerk's Transcript in the Court of Appeals. "R.T.I." refers to the Reporter's Transcript of the May 11, 1978 hearing and "R.T.II" refers to the Reporter's Transcript of the May 15, 1978 hearing, both part of the record of the Court of Appeals.

cell by Sheriff's Deputy Meyer and agents of the Drug Enforcement Administration (R.T. II: 120-121). The combination lock on that suitcase was pried open by Government agents (R.T. II: 115-116). Inside the suitcase was a smaller metal case bearing another combination lock (R.T. II:116). The agents and deputy broke into this smaller case (R.T.II:119). Inside the smaller case was a package covered with wrapping paper. This wrapping paper had Mr. Conway's fingerprints on it and when opened was found to contain the cocaine suppressed by the District Court (R.T. I:43). The record does not reflect that the paper had Mr. Mazzelli's or any other fingerprints on it.

This entire process took about one hour, during which time Messrs. Conway and Mazzelli were detained without probable cause (*Id.*, Petition: 3a). At the conclusion of this hour, Mr. Conway was told that the suitcase had been broken open and cocaine found. His response was, "You'll be arresting me then for conspiracy" (R.T.II:23).

REASONS FOR DENYING THE PETITION

1. The essential facts relevant to Respondent Conway's Fourth Amendment rights are much more extensive than described by the Petition and obviate the need to reach the question therein presented. The entire Petition proceeds on the assumption that the only fact establishing Respondent Conway's right to challenge the instant search is his possessory interest in the seized cocaine.

The facts before the District Court relevant to Mr. Conway's reasonable expectation of privacy, and ignored by Petitioner, are set forth in the Statement of Facts above

and the Court of Appeals' opinion (Petition: 2a-5a). These facts demonstrate that Conway and Mazzelli were clearly associated with each other, having stayed together in Miami and travelled together from Miami to San Francisco. Conway was the owner of the suitcase, which he had recently purchased (Petition 4a, C.T.:52). He shared the use of the suitcase with his travelling companion and co-defendant Mazzelli. He retained a "possessory and proprietary interest" in the suitcase throughout this trip and up to "the time of the search" (Petition: 4a)[2].

The Petition ignores these facts, apparently on the basis that "the district court did not resolve the question and the court of appeals did not rely on respondent's claim of ownership in ruling in his favor" (Petition: 4, n. 4). However, the District Court simply made a general finding that given "the facts of this case" the suppression order should be made as to both defendants (R.T. I:42). The factual basis was not limited or expressly specified. The judgment must be given all reasonable inferences in its favor and a reviewing court will consider all reasonable bases shown by the record in support of the judgment. *United States v. Hood*, 493 F.2d 677, 680 (9th Cir. 1974); *United States v. Hart*, 546 F.2d 798 (9th Cir. 1976 en banc), *cert. den.* 97 S.Ct. 1155 (1977); *United States v. Page*, 302 F.2d 81, 85 (9th Cir. 1976 en banc).

Moreover, the fact that an appellate court opinion does not rely on a particular ground for its decision does not

[2]Since Mr. Conway had a possessory and proprietary interest in the suitcase, the Government's proposed distinction between an illegal search and an illegal seizure, as well as its arguments concerning ownership of contraband alone as a basis for Fourth Amendment rights, are completely inapplicable to this case.

prevent a party from urging that ground in support of the decision. On the contrary, the prevailing party retains the right to urge all grounds in support of the lower court's decision. *Walling v. General Industries Co.*, 330 U.S. 545, 547 (1947); *Langes v. Green*, 282 U.S. 531, 538 (1931).

Thus the question presented herein is not whether a possessory interest in cocaine taken alone gives rise to a right to challenge a search, but whether this interest in combination with all the other facts in this case give rise to a reasonable expectation of privacy by Mr. Conway. More precisely, the question presented is whether the District Court's judgment that such an expectation of privacy existed can be said to be clearly erroneous.

The case at bar presents ample facts to support the district court's finding of standing. Conway bought the suitcase and retained a proprietary interest in the suitcase at the time of the search. He had an admitted possessory interest in the contents of the suitcase and it was reasonable to presume he placed those contents in the suitcase.[3] He accompanied the person who carried the suitcase throughout the voyage. He knew the suitcase had a combination lock and since he purchased it, it is reasonable to assume he knew the combination.[4] On this totality of facts, the conclusion that Mr. Conway had a reasonable expectation of privacy in the suitcase searched can not be said to be clearly erroneous.

[3]Conway stayed with Mazzelli in Miami and his fingerprints were on the package of cocaine inside the locked suitcase.

[4]The record does not reflect that Mazzelli knew the combination to either case and the only fingerprints shown to have been found inside the locked suitcase were those of Conway, not Mazzelli.

(2) Even if the Petition did accurately state the relevant facts, the Court should deny certiorari. This is because where the primary dispute in a case turns on the meaning and interpretation of facts and evidence, the case is inappropriate for certiorari. This is particularly true where both lower courts have reached the same conclusion, as occurred in the case at bar. *Berenyi v. Immigration Director*, 385 U.S. 630, 635 (1967); *Graver Mfg. Co. v. Linde Co.*, 336 U.S. 271, 275 (1949); *United States v. Johnston*, 268 U.S. 220, 227 (1924) ("We do not grant a certiorari to review evidence and discuss specific facts").

(3) It is a long settled rule that a party may not raise an error when he consciously and intentionally failed to object to the error and led the trial court to believe he was satisfied. *Johnson v. United States*, 318 U.S. 189 (1942), rehearing denied 318 U.S. 801; *Lawn v. United States*, 355 U.S. 339 (1957); *United States v. Manton*, 107 F.2d 834, 847-848 (2d Cir. 1938); *United States v. Friedman*, 506 F.2d 511, 515 (8th Cir. 1974), *cert. den.* 421 U.S. 1004, rehearing denied 423 U.S. 885. This prevents parties from, among other things, adopting one course of procedure and, after a decision goes against them, obtaining a retrial based on this procedure. *Carruthers v. Reed*, 102 F.2d 933, 938 (8th Cir. 1939).

In the case at bar the Government raised the issue of standing at the suppression hearing and indicated that a stipulation as to Conway's possessory interest in the cocaine would be factually sufficient to establish his standing (Petition: 4a-5a; R.T. I:43-44). When the stipulation was entered, the Government led the court and de-

fense counsel to believe it was satisfied with this showing in support of standing *(Id.)*. Similarly, when counsel for Conway submitted an affidavit which alleged further facts in support of standing, the Government again indicated the sufficiency of those facts, saying, "Under the *Pruitt* [sic] case, he has alleged a possessory interest".[5] The Government now argues the insufficiency of the very facts which it elicited and then accepted as sufficient in the district court. Such tactics are unfair in that the opposing party naturally declines to proceed further or put in additional evidence when the evidence already submitted is said to be sufficient. The Government should not be allowed to take advantage of such tactics.

Here the "error" complained of was expressly discussed in the district court. Petitioner not only failed to object, but he consciously and intentionally invited the error through asking for and accepting as sufficient the evidence of standing. A party cannot object to a ruling that he or she invited. *Tucker v. United States*, 375 F.2d 363, 367 (8th Cir. 1967), *cert. den.* 389 U.S. 888; *United States v. Kahn*, 366 F.2d 259, 265 (2d Cir. 1966); *Hanks v. United States*, 388 F.2d 171, 173 (10th Cir. 1968); *United States v. Benson*, 495 F.2d 475, 478-479 (5th Cir. 1974); *United States v. Pentado*, 463 F.2d 355, 362 (5th Cir. 1972), *cert. den.* 409 U.S. 1079.

Therefore, even assuming, *arguendo*, that the stipulation and affidavit were insufficient for standing, there is no reversible error because the Government invited the error

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[5]The Government referred to *United States v. Prueitt*, 540 F.2d 995 (9th Cir. 1976).

and intentionally waived any objection to it. The Petition should be denied because this Court need not reach the issue of the validity of the stipulation and affidavit.

(4) In the instant case the primary emphasis in the district court was on the legality of the search. As discussed above, there was no real dispute as to standing and the Government accepted the facts presented as sufficient to establish standing. Appeal was first taken as to both defendants, apparently with the intention of arguing the legality of the search. It was only the day before the opening brief was to be filed that the appeal was dismissed as to Mazzelli and Mr. Conway's standing appeared as the only issue (C.T. 97, 106). At no time in the District Court was there the slightest mention of either of the two legal theories[6] raised in the Petition before this Court. Furthermore, even in the Court of Appeals these issues were only developed in the Petition for Rehearing and Suggestion for Rehearing in Banc.[7]

This Court is a court of review and will not pass on questions of law not presented to the lower courts. *Bell v. Bruen,* 42 U.S. 169 (1843); *Virtue v. Creamery Package Mfg. Co.,* 227 U.S. 8, 38-39 (1912); *Weade v. Dichmann, Inc.,* 337 U.S. 801 (1949); *United States v. Lovasco,* 431 U.S. 783, 788 fn. 7 (1977).

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[6]I.e., the proposed distinction between a search and seizure and the contention that no legitimate expectation of privacy arises from ownership of contraband.

[7]The thrust of the Government's argument prior to the Petition for Rehearing was that Conway's affidavit should be disbelieved or that he abandoned the suitcase.

Deviations from this rule are found only in the most exceptional cases. *Duignan v. United States,* 274 U.S. 195, 200 (1926); *United States v. Atkinson,* 297 U.S. 157 (1935); *Helvering v. Hormel,* 111 F.2d 1 (8th Cir. 1940) cert. granted 311 U.S. 626, affirmed 312 U.S. 552 (1940).

This case is exceptional, if at all, only in being totally unsuitable for Supreme Court review. The issues now raised were never even recognized in the District Court, much less raised or developed. This Court should deny the Petition.

(5) Even assuming that this Court ignored the search of the suitcase, as urged by the Petition, the seizure of the cocaine and search of the package containing it were illegal. Petitioner contends that once the suitcase had been opened, the contraband was in plain view (Petition: 6, n.7). This is factually incorrect. Inside the suitcase was a metal case which was broken open and inside that was a package which was opened. Only then was the cocaine in plain view (R.T. II:115-116). The seizure of the cocaine and the search of its package were illegal and provide an additional ground in support of the lower court's judgment.

(6) Assuming that this Court could somehow reach the question, the proposed distinction between a search and seizure has no application to the facts herein. In this case Respondent conceded a proprietary interest in virtually the entire contents of the suitcase. It would seem apparent that a person who owned virtually the entire contents of a suitcase would have a reasonable expectation of privacy as to any opening of that suitcase. Petition: 7a-8a; *United States v. Wilson,* 536 F.2d 883, 885 (9th Cir. 1976);

United States v. House, 524 F.2d 1035, 1042 (9th Cir. 1975). Thus, while the proposed distinction may be important in the context of a defendant who owns one item in a store, house, or other large structure, the expectation of privacy as to a suitcase belongs almost exclusively to the owner of its contents. *C.f., United States v. Crowell,* 586 F.2d 1020 (4th Cir. 1978); *United States v. Jackson,* 585 F.2d 653 (4th Cir. 1978); *United States v. Smith,* 550 F.2d 277 (5th Cir. 1977); *United States v. Galante,* 547 F.2d 733, 739 (2d Cir. 1976). Thus the question presented is not whether Conway's ownership of seized property gives him an automatic right to object to any search leading to the seizure. Instead, the question is whether on the facts of this case Conway's ownership of the contents of the suitcase gave him an expectation of privacy as to the suitcase itself. In any event, if this Court is to accept for review a case dealing with the issue, it should be a case which presents the issue squarely on facts similar to those in the circuit court cases cited above.

(7) Even assuming that this Court considers only Mr. Conway's proprietary and possessory interest in the contraband, this case does not present the question whether a person can have a legitimate possessory interest in stolen property or contraband for Fourth Amendment purposes. In this case, Mr. Conway's interest in the contraband was evidence of his privacy interest in the suitcase, metal case and package which contained the contraband. The illegal search was of these containers and Mr. Conway's privacy interest in relation to these containers was completely legitimate. This case is thus unlike an asserted privacy interest in a stolen automobile or stolen suitcase.

Rakas v. Illinois, ... U.S. ....., 58 L.Ed.2d 387 (1978); *United States v. McCambridge,* 551 F.2d 865, 870, n.2 (1st Cir. 1971). On the contrary, this case is like the vast majority of suppression cases where contraband or items probative of crime are ultimately discovered through a search. If the presence of contraband or evidence of crime makes a defendant's expectation of privacy illegitimate, then very little remains of the Fourth Amendment in criminal cases.

CONCLUSION

The petition for a writ of certiorari should be denied.

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Respectfully submitted,

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